

1584TERmsS

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

14 Cr. 701 (VB)
Sentence

5 SAMUEL TERWILLIGER,

6 Defendant.

7 -----x

8 White Plains, New York
9 August 4, 2015
2:10 p.m.

10 Before:

11 THE HONORABLE VINCENT L. BRICCETTI,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
Southern District of New York

16 MARCIA SUE COHEN

Assistant United States Attorney

17 JASON I. SER

Attorney for Defendant

18 Also Present: JESSICA MILLER
19 Special Agent, FBI

20 DANA KRAUSHER
21 Paralegal, Federal Defenders

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1 THE DEPUTY CLERK: United States of America against
2 Samuel Terwilliger.

3 Will counsel please note their appearance for the
4 record.

5 MS. COHEN: Marcia Cohen for the government.

6 With me at counsel table is Special Agent Jessica
7 Miller of the FBI.

8 THE COURT: Good afternoon.

9 MR. SER: Good afternoon, your Honor.

10 Jason Ser, Federal Defenders, for Mr. Terwilliger, who
11 is present.

12 And along with me is Dana Krausher of my office.

13 THE COURT: Okay. Good afternoon, everybody.

14 Have a seat, please.

15 This matter is on for sentencing today, the defendant
16 having pleaded guilty to attempting to entice a minor to engage
17 in sexual activity, in violation of 18 United States Code
18 Section 2422(e).

19 I reviewed the following materials in preparation for
20 sentencing: A revised presentence report dated April 30th,
21 2015, prepared by Probation Officer Susan P. Matthews; plea
22 agreement dated October 22nd, 2014; defense counsel's
23 sentencing memorandum dated July 28, 2015, as well as letters
24 and materials attached thereto, including a letter from the
25 defendant. Mr. Ser also submitted a letter to me today,

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1 August 4th, attaching a letter from Dr. Alexander Bardey. I've
2 reviewed that, as well.

3 MR. SER: My apologies on that, your Honor.

4 THE COURT: Don't worry about that.

5 I've also reviewed the government's sentencing letter
6 dated July 30th, 2015, and an additional letter from the
7 government, also dated July 30th, 2015, correcting one aspect
8 of its principal sentencing letter.

9 I've also reviewed the psychosexual evaluation
10 prepared by Dr. M. G. Berrill, which was prepared for the
11 Probation Office. And that's dated March 20th, 2015.

12 Has anything else been submitted that I failed to
13 mention?

14 Ms. Cohen?

15 MS. COHEN: Not that I'm aware of.

16 THE COURT: Mr. Ser?

17 MR. SER: No, your Honor.

18 Thank you.

19 THE COURT: All right. Mr. Ser, have you read the
20 presentence report and discussed it with your client?

21 MR. SER: Yes, your Honor.

22 THE COURT: Mr. Terwilliger, have you read the
23 presentence report?

24 THE DEFENDANT: Yes.

25 THE COURT: Have you discussed it with your attorney?

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1 THE DEFENDANT: Yes.

2 THE COURT: And, Ms. Cohen, have you read the
3 presentence report?

4 MS. COHEN: Yes.

5 THE COURT: The presentence report calculates the
6 sentencing range as follows: The base offense level is 32.
7 That's guideline Section 2G2.1(a). There's a two-level upward
8 adjustment because the offense involved a minor between the
9 ages of 12 and 16 years of age. That's 2G2.1(b) (1). Two-level
10 upward adjustment for use of a computer. That's 2G2.1(b) (6).
11 And a five-level upward adjustment based on a pattern of
12 activity involving prohibited sexual conduct. That's
13 Section 4B1.5. That adds up to 41 as the -- 41 is the offense
14 level, minus three levels off for acceptance of responsibility,
15 such that the final offense level is 38. The Criminal History
16 Category is I, based on zero criminal history points. And
17 therefore, according to the presentence report, the sentencing
18 range is 235 to 293 months' imprisonment, with a mandatory
19 minimum of 120 months. And his supervised release range is
20 five years to life. The fine range is \$25,000 to \$250,000, all
21 according to the PSR.

22 Does the government have any objection to the factual
23 statements in the PSR?

24 MS. COHEN: Your Honor, I realized that there is --
25 actually, in Paragraph 3, there's a reference to the

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1 defendant's plea before Judge Smith on October 22nd. And in
2 fact, the defendant's plea was before the Court on
3 October 28th.

4 THE COURT: Well, Judge Smith is also the Court. But
5 yes, you mean it was in front of me.

6 MS. COHEN: Yes.

7 THE COURT: And it was in front of me. And I note
8 that, but that's not a problem. I think you said that in your
9 letter, as well.

10 MS. COHEN: I actually repeated the information in the
11 PSR, and didn't realize until --

12 THE COURT: Well, in fact, I took the plea. That's
13 correct.

14 Other than that, are there any objections to any
15 factual statements in the PSR in front of me?

16 MS. COHEN: No.

17 THE COURT: Does the defendant have any objections to
18 the factual statements in the PSR?

19 MR. SER: No, your Honor.

20 THE COURT: Okay. There being no dispute as to the
21 facts, the Court adopts the factual statements in the PSR as
22 the Court's own findings of fact for purposes of sentencing.

23 Does the government have any other objections to the
24 PSR or its guidelines calculation?

25 MS. COHEN: No.

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1 THE COURT: Does the defendant have any other
2 objections to the PSR or its guidelines calculation?

3 MR. SER: No, your Honor.

4 THE COURT: Based on the parties' agreement as set
5 forth in their plea agreement, as well as my review of the
6 presentence report and my own evaluation of the guidelines, I
7 adopt the guidelines calculation in the presentence report, and
8 conclude that the final offense level is 38, Criminal History
9 Category I, which yields a sentencing range of 235 to 293
10 months' imprisonment. There has been no motion for any
11 guidelines-based departure from the applicable range.

12 Ms. Cohen, does the government wish to be heard on
13 sentencing?

14 MS. COHEN: Very briefly.

15 Your Honor, the government requests that the Court
16 impose a sentence in the guideline range of 235 to 293 months
17 for all the reasons in our submission. It is our view that the
18 requested sentence is appropriate here, in light of the
19 seriousness of the defendant's offense, as well as the need to
20 punish the defendant, and also the need to protect the public
21 from him.

22 THE COURT: Okay. Thank you, Ms. Cohen.

23 Mr. Ser, do you wish to be heard?

24 MR. SER: Just briefly, your Honor.

25 I wanted to point out that Mr. Terwilliger has some

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1 family members in the court to your Honor's right in the first
2 pew. So he has, fortunately, some family and community
3 support. One of them is his ex-wife who he remains close with,
4 as well as his mother.

5 This is a very difficult case; in particular, given
6 Mr. Terwilliger's tragic childhood history, which I've outlined
7 in great detail.

8 The only thing I would note is, he grew up in a very,
9 very serious mental health history.

10 I understand the government's concerned about
11 dangerousness. However, I think the Court needs to consider
12 prioritizing treatment for Mr. Terwilliger. It's clear that
13 the issues he dealt with, which were well documented, when he
14 was a young child, according to studies, can morph, and did, in
15 fact, morph, into the personality disorder he now suffers from,
16 according to Dr. Berrill. Dr. Bardey, as well as studies I've
17 cited, have indicated that there is treatment that's available
18 that could be successful for Mr. Terwilliger in the future.

19 Personality disorder is something that can be fixed
20 with various modalities. And so what I would ask the Court to
21 consider doing --

22 And ten years minimum is a very, very lengthy time of
23 time in custody for someone like Mr. Terwilliger with no
24 criminal history, never having before been in custody and
25 having to be in custody with the history he has. It will be a

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1 very difficult period of time, regardless of the length. But
2 ten years is a very serious sentence, especially for a
3 first-time offender.

4 And I think what needs to be done is, he needs
5 significant and long-term treatment post-release once out of
6 custody, regardless of what that sentence might be. But I
7 think prioritizing under 3553(a) (2) (d) his future psychological
8 treatment, as opposed to enlarging a term of punishment to what
9 the government is requesting, I think we need to prioritize the
10 treatment. I guess that's the point I'm making.

11 So I've briefed everything in extreme detail. Unless
12 your Honor has particular questions, I'm prepared to submit on
13 my letter.

14 THE COURT: All right. Thank you, Mr. Ser.

15 Before I ask Mr. Terwilliger if he has anything to
16 say, your initial submission, you wanted to have it filed under
17 seal. Is that correct?

18 MR. SER: Please, your Honor.

19 THE COURT: The personal nature of so much of the
20 material contained therein. And I assume that's true with your
21 letter from today, as well?

22 MR. SER: Please, your Honor.

23 THE COURT: The government's letters are not on the
24 docket. Were you planning to file them on the docket? Or
25 should I just have them docketed?

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1 MS. COHEN: You know, actually, I held off on that,
2 because I saw that Mr. Ser had asked for the sealing.

3 THE COURT: Well, I'm not sure that you're saying --

4 MS. COHEN: I don't think there's anything that needs
5 to be under seal in the government's letter.

6 THE COURT: The thing is, Mr. Ser's submissions
7 include all these reports and social services reports and
8 doctor's reports and all these things that are sort of beyond
9 the scope of just legal argument. Whereas, the government's
10 submissions amount to legal argument. And I think that the
11 government's -- both the government's letters should be -- you
12 should docket both of them under seal.

13 MS. COHEN: Will do, your Honor.

14 THE COURT: All right. Thank you for doing that.

15 Okay. Mr. Terwilliger, do you have anything you'd
16 like to say or anything information you'd like to present
17 before I impose sentence?

18 THE DEFENDANT: No, your Honor.

19 THE COURT: Okay. You can have a seat, then.

20 All right. Well, let me say first, that in deciding
21 the appropriate sentence in this case, I've considered all of
22 the statutory factors set forth in Title 18, United States
23 Code, Section 3553(a). And having done so and for the reasons
24 that I will put on the record in a moment, I believe that a
25 sentence of 144 months' imprisonment, which is 12 years, to be

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1 followed by 5 years of supervised release, is sufficient, but
2 not greater than necessary, to comply with the purposes of
3 sentencing set forth in the statute.

4 This is a very serious offense warranting a very
5 serious sentence. I've said this many times before, but the
6 single most important thing to me in sentencing is: What did
7 the defendant do? I am always interested in other aspects of
8 sentencing, such as prior criminal record and the personal
9 history of the defendant, and all of the other matters that are
10 referred to in Section 3553(a). But the most important factor
11 is: What did the defendant do?

12 And here, what the defendant did was engage in a
13 concerted effort to persuade someone that he believed to be a
14 13-year-old girl to come live with him and to have his baby.
15 The girl turned out actually to be an undercover FBI agent, but
16 he certainly thought it was a 13-year-old girl. He repeatedly
17 "solicited" the girl -- I put that word in quotes -- to send
18 him pictures of her naked body. He also graphically described
19 various sex acts he wanted to engage in with the girl,
20 including sex acts involving the defendant and his girlfriend.

21 When the defendant was confronted about this, he
22 admitted engaging in these sexually explicit conversations. He
23 also admitted that on one occasion in October of 2013, which
24 was actually after the conversations with the undercover had
25 ended, that he had engaged in sexual intercourse with a

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1 15-year-old girl while his girlfriend watched.

2 Having said that, the sentence recommended by the
3 guidelines, 235 to 293 months, or roughly 19 and a half to 24
4 and a half years, is unreasonably excessive. The sentence in
5 the approximately 20-, 25-year range for a sex crime, in my
6 view, should be reserved for the worst offenders, and that does
7 not include Mr. Terwilliger.

8 For example, someone who has committed a forcible rape
9 or other violent sex crime or series of sex crimes, or someone
10 who has prior convictions for sex crimes: That's the kind of
11 person that a sentence in the 20- to 25-year range -- that's
12 the kind of person for whom a sentence in the 20- to 25-year
13 range may be appropriate.

14 But that's not the case here. The defendant did not
15 actually engage in sexual activities with the 13-year-old. He
16 wanted to do so, but fortunately, that never came to pass.

17 He has no prior convictions. This is his first
18 arrest. He did admit to having sex with a 15-year-old, which
19 is certainly a criminal act. But there is no indication that
20 it involved force or violence. Indeed, I'm advised by
21 Mr. Ser -- and the government did not take issue with this --
22 that Mr. Terwilliger was charged with rape in the third degree,
23 often referred to as "statutory rape," in state court in
24 Sullivan County. And that offense does not have as an element
25 the element of force or violence. It's simply someone who's

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1 over 21 years of age having sexual intercourse with someone
2 under age 17. In any event, that's what he's charged with,
3 with respect to that act.

4 The parties have stipulated to the advisory guidelines
5 range, and I found that that is the applicable range. However,
6 there are a number of aspects of the applicable guidelines
7 enhancements that, to a large extent, artificially inflate the
8 range here.

9 First of all, there's the two-level enhancement for
10 use of a computer. Almost by definition, the enticement
11 offense requires the use of a computer. And certainly, in my
12 experience, the vast majority of people charged with this
13 offense use a computer. So that two-level enhancement seems
14 somewhat redundant.

15 But that's the least of it. The other things are that
16 the defendant's attempt to obtain a visual depiction of a
17 13-year-old engaged in sexually explicit conduct caused the
18 otherwise applicable final offense level of 30, under Guideline
19 Section 2G1.3, to become 36 under 2G2.1. Of course, that's
20 before three levels off for acceptance. But as I understand
21 it, the base offense level here under 2G1.3 is 28. Two levels
22 are added for use of the computer, which puts you at level 30.
23 Unless the defendant attempted to obtain a visual depiction of
24 a minor engaged in sexually explicit conduct, in which case
25 2G2.1 applies, and if the final offense level calculated under

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1 2G2.1 exceeds that calculated under 2G1.3, then 2G2.1 applies.

2 When you do that here, you start out at Level 32.

3 There's a two-level enhancement for use of a computer. There's
4 another two-level enhancement for the fact that the minor -- or
5 in this case, the person that the defendant believed to be a
6 minor -- was between the ages of 12 and 16. So you end up at
7 Level 36. So effectively, there's a six-level difference
8 because of the attempt to obtain a visual depiction of a minor
9 engaged in sexually explicit conduct.

10 This is a correct application of the guidelines as
11 they are written. But in fact, here, no minor ever engaged in
12 sexually explicit conduct to produce a visual depiction of such
13 conduct. That never happened. And it could not have happened,
14 because the person that the defendant believed was a minor was,
15 in fact, an undercover FBI agent.

16 So the six-level increase -- it's not all at once, but
17 the six-level difference, meaning Level 36 as opposed to
18 Level 30, that's the correct calculation of the guidelines, but
19 given that there was no minor involved in this, there was no
20 visual depiction obtained, nor could it ever have been
21 obtained, my view is that this six-level enhancement is not
22 quite the right word, but the fact that the guidelines end up
23 being six levels higher than they otherwise would be tends to
24 overstate the seriousness of the offense.

25 And finally, although the five-level upward adjustment

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1 for engaging in a pattern of activity involving prohibited
2 sexual conduct applies, again, under the circumstances here,
3 this adjustment tends to overstate the seriousness of the
4 defendant's conduct. After all, the title of Section 4B1.5 is,
5 quote, "Repeat and Dangerous Sex Offender Against Minors," end
6 quote. But here, the defendant has actually engaged in only
7 one criminal sex act with an actual minor, the 15 year old in
8 October 2013, and he hasn't been convicted of that.

9 The other occasion of prohibited sexual conduct that
10 would be considered under 4B1.5 is, of course, the offense of
11 conviction, and that offense was an effort to persuade what
12 turned out to be an undercover FBI agent to engage in sex.

13 Again, don't get me wrong. I am not finding that
14 these enhancements do not apply. They do apply. But they
15 really do not quite fit the actual conduct at issue here,
16 which, again, is an attempted enticement, combined with a
17 single other, but not prior, occasion of sex with a minor,
18 without any indication that the other engagement involved force
19 or violence, and where the defendant has not been convicted of
20 a crime in connection therewith.

21 As I said a moment ago, the charge that the defendant
22 faces in connection with that October 2013 incident is
23 statutory rape. And under New York law, the sentence for such
24 an offense, if he's convicted of that, is between one and a
25 half and four years. Here, the impact of that conduct is to

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1 raise the offense level by five levels. In other words, if you
2 add Level 36 minus three for acceptance, you end up at
3 Level 33. A hundred thirty-five months is the bottom of that
4 range in Criminal History Category I. If you add five levels
5 and you end up with Level 38, 235 months is the bottom of the
6 range. That's a hundred-month difference, and a difference of
7 about eight and a half years. So a crime which under New York
8 law would carry a maximum sentence of four years' imprisonment
9 and a minimum sentence of one and a half years has the effect
10 of increasing the guideline range in this case by eight and a
11 half years. And that just strikes me as plainly unreasonable.

12 The other reason why it's unreasonable is that that
13 other offense, the one in October 2013, he hasn't even been
14 convicted of that. But let's assume that he was convicted of
15 that. Still, the effect of that criminal episode here is an
16 eight-and-a-half year increase in the guideline range, which
17 strikes me as unreasonable, considering that the maximum
18 sentence for that offense would be four years' imprisonment.

19 Now, I do believe that the enhancements under 2G2.1
20 and 4B1.5 should raise the defendant's guideline range above
21 what would otherwise be the applicable range. And if you go
22 back to 2G1.3 where we started, the final offense level would
23 be 27. If he started at 28, added two for computer usage,
24 subtracted three for acceptance of responsibility, you'd end up
25 with 27.

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1 When the enhancements under 2G2.1 and 4B1.5 are
2 factored in, then the guideline range is not 27, but rather 38,
3 which is an 11-level increase, which is a dramatic increase.
4 And there should be an increase. And I certainly agree that
5 there should be an increase. At Level 27, the guideline range
6 is 70 to 87 months. Of course, here, the minimum would be 120
7 months. But Level 27 is 70 to 87 months. Level 38 is the
8 aforementioned 235 to 293 months. So that's about what? A
9 roughly 14-year difference, which is a really big difference.

10 And even if you assume that the otherwise applicable
11 range is 120 months, which I think is correct, because this is
12 a mandatory minimum case, still, those enhancements take the
13 case from 120-month range up to the -- basically, they double,
14 and that makes it 235 months. So it's roughly a ten-year
15 increase.

16 And again, I just think that that magnitude of
17 increase, based on these enhancements which do apply, is not
18 reasonable under the particular circumstances of this case.
19 There should be an increase, but it should be a reasonable
20 increase. And in my view, the increase that would be
21 appropriate is about half of the increase that is called for by
22 the application of the guidelines. In other words, instead of
23 increasing it by eleven levels, I think a six-level increase
24 would be more appropriate. And a six-level increase to
25 Level 33 would yield an advisory sentencing range of 135 to 168

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1 months, which I believe is both sensible and reasonable, and
2 takes into account not only the offense of conviction, but also
3 the other incident involving the 15-year-old in October of
4 2013.

5 Now, there is another significant sentencing factor
6 here that is relevant to me in determining the ultimate
7 sentence, and that is that the defendant has a documented
8 history of emotional and mental health problems since he was a
9 small child. There is documentary evidence that he was also
10 the victim of physical and psychological abuse since he was a
11 small child, all of which is spelled out in great detail in the
12 defendant's sentencing memorandum. And it's also summarized in
13 Dr. Berrill's report. So I don't need to resummairize it here.
14 I don't think there's any dispute about any of the information
15 contained in Mr. Ser's sentencing memo or in Dr. Berrill's
16 report about Mr. Terwilliger's rather unfortunate background.

17 Common sense and experience compel the conclusion that
18 the defendant's criminal acts here, including both the offense
19 of conviction and the other instance of sexual misconduct with
20 a 15-year-old, are attributable, at least to some extent, to
21 the defendant's troubled and abusive upbringing, as well as to
22 his history of emotional problems and mental illness.

23 In short, the fact is that the 235 to 293 month
24 recommended sentencing range is unreasonable, in that it
25 overstates the seriousness of the offense and the true nature

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1 of the defendant's pattern of activity involving prohibited
2 sexual conduct, and also the fact that the defendant has had,
3 to say the least, a troubled background and continues to suffer
4 from emotional problems and mental illness.

5 Based on those facts, I believe that a sentence of 144
6 months is sufficient, but not greater than necessary, in this
7 case.

8 Now, I am acutely aware of the fact that while I have
9 the authority to vary from the guideline range, that the
10 greater the variance I think is appropriate, the greater the
11 rationale should be for that variance. And here, this is a
12 significant variance, because it's from roughly 19 and a half
13 years at the bottom of the range to 12 years. So it's roughly
14 a seven-year variance, you might say. And I recognize that
15 that is a significant variance. But I sincerely believe that
16 because the guidelines overstate to some extent -- I don't want
17 anybody to get the impression that I think that this is not a
18 serious crime or that I'm somehow making excuses for what
19 Mr. Terwilliger did. I'm not doing that. But to some extent,
20 these enhancements overstate the seriousness of his conduct.

21 He's not someone who's been repeatedly convicted of
22 sex crimes. He has never been engaged, so far as we know, in
23 any violent or forcible rape or some other crime of violence.
24 He did solicit a visual depiction of prohibited sexual
25 activity, but he didn't get one. And this is to be

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1 distinguished from cases that I've had where defendants have
2 actually created visual depictions with minors, the visual
3 depictions of prohibited sexual activity with minors. None of
4 that applies here. That doesn't describe this offense at all.

5 And even when you factor in the other offense, which,
6 after all, he self-reported to the agents when he was
7 interviewed, I guess it was April 2014, that offense, as
8 well -- and he hasn't been convicted of it, but let's assume he
9 did it -- that offense, as well, does not involve force or
10 violence.

11 So I just don't think that he should be sentenced as
12 if he was a repeated violent sex offender, which I really
13 believe is the primary target of particularly the 4B1.5
14 enhancement, but even to a lesser extent, but an important
15 extent, the "visual depiction" enhancement, which is directed
16 at someone who is not only engaged in an enticement, but also
17 engaged in an effort to get a minor to engage in prohibited
18 activity, and then create a visual depiction of that activity.
19 I just think that under the circumstances here, those
20 enhancements overstate the significance of Mr. Terwilliger's
21 crime.

22 Let me just say a couple of words about the
23 government's sentencing submission.

24 First of all, I agree with the government that a
25 lengthy prison sentence is appropriate, given the seriousness

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1 of the defendant's conduct, the need to impose just punishment,
2 and the need to protect the public from further crimes by the
3 defendant.

4 The 144 months, 12 years, is such a sentence. It is
5 two years above the mandatory minimum. It takes into account
6 the aggravating factors of soliciting a visual depiction of
7 sexually explicit conduct. And secondly, it takes into
8 consideration the fact that the defendant engaged in sexual
9 intercourse with a 15-year-old around the same time that he was
10 attempting to entice what he thought was a 13-year-old to come
11 live with and engage in sexual acts with him. It also takes
12 into account the fact that the defendant has no criminal
13 history, and certainly no prior sex offense arrests or
14 convictions. It also takes into account the defendant's
15 documented history of abuse and mental illness.

16 So while I agree with the government that a lengthy
17 prison sentence is warranted, I emphatically do not agree that
18 the sentence should be in the 20- to 25-year range.

19 I also take issue -- and this is, I suppose, even what
20 I've already said about the sentence I intend to impose and
21 why, this is in the nature of dicta, I suppose. But,
22 Ms. Cohen, I actually think you're making a mistake to use
23 Dr. Berrill's report as a sword. What you did in your letter
24 is, you said, "According to Dr. Berrill, the defendant was
25 unwilling or unable to accept responsibility." And you

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1 referenced certain things that the defendant had said to
2 Dr. Berrill.

3 But let's remember, a report like this is prepared at
4 the direction of the Court, not the U.S. Attorney's Office.
5 It's prepared by the Court through the Probation Office to
6 determine treatment needs and an assessment of risk to the
7 community upon the defendant's release from prison.
8 Dr. Berrill's report absolutely accomplishes those purposes.
9 No question about it. And as a result, the presentence report
10 recommends that the defendant be closely supervised upon his
11 release, that he needs counseling and mental health treatment,
12 including sex-offender-specific treatment.

13 In Dr. Bardey's letter that I received today,
14 Dr. Bardey, likewise, recommends individual and group therapy,
15 as well as psychiatric medications.

16 Secondly, Dr. Berrill's report was not done for the
17 purpose of gathering evidence to be used against the defendant
18 at sentencing. Indeed, if the government views such reports
19 that way, and uses them that way, interprets them that way,
20 which is exactly what Ms. Cohen did in her letter, it will have
21 the effect of discouraging defendants and defense counsel from
22 agreeing to undergo such evaluations. Again, this is an
23 evaluation recommended by Probation and ordered by the Court.
24 And it also will discourage defendants from being honest during
25 these evaluations. And if defendants are discouraged in that

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1 way from either being honest or even agreeing to undergo the
2 evaluation, that would be, to say the least, extremely
3 counterproductive.

4 The whole purpose of the report is to determine
5 treatment needs and risk assessment after the defendant is
6 released from prison. It's not designed to discover new
7 evidence that can be used by the government at sentencing to
8 ratchet up the sentence or to otherwise support the sentencing
9 position that the government wishes to take.

10 For what it's worth, my view is that if a defendant
11 were to say -- or defense counsel were to say, "Look. My
12 client declines to undergo such an evaluation," I would be
13 completely fine with that. I would treat that as a nonevent.
14 I wouldn't hold it against the defendant. Of course, there
15 might be some benefits that the defendant might get from such a
16 report. There might be some things that an evaluator might say
17 about the defendant which actually would help the defendant at
18 sentencing. But I certainly wouldn't hold it against a
19 defendant if the defendant or his counsel declined to undergo
20 such an evaluation.

21 And I'm very concerned that if it's the government's
22 position that this is a win-win for the government, because on
23 the one hand, it's good to find out what the defendant's
24 problems are, and in addition to that, if the defendant says
25 some things or the doctor says some things which can be used

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1 against the defendant at sentencing to support the government's
2 position for a more severe sentence, well then, that's great,
3 too, the government might think.

4 I actually think that that is a perverse approach,
5 because -- I suppose that's an ironic word to use in this case,
6 but I really think it's counterproductive. That's a better
7 word to use. It's counterproductive, because it's going to
8 discourage people from undergoing evaluations which are in the
9 interest of the Court and the public, in terms of determining
10 what the appropriate treatment should be and what the risk
11 assessment should be for the defendant once he's released from
12 prison.

13 In any event, I don't even agree with the government
14 that the defendant was -- the government says it showed that --
15 "what he said to Dr. Berrill showed that he was unwilling or
16 unable to accept responsibility." I think what it shows is
17 that the defendant is an extremely troubled person with a
18 serious antisocial personality disorder. That's not the exact
19 words used by Dr. Berrill.

20 Hold on just one second.

21 (Pause)

22 THE COURT: "Personality disorder, as well as impulse
23 control disorder." In other words, he's a highly troubled
24 individual who doesn't understand fully the magnitude of the
25 seriousness of what he's done. But it doesn't mean that he

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1 wasn't being honest. I think that he -- my impression of
2 Dr. Berrill's report is that he was being quite honest with
3 Dr. Berrill in admitting things which, if he didn't have these
4 mental health issues and emotional disorders and other problems
5 that he has, he almost certainly would not admit. Most people
6 would not say --

7 You don't need to speak at this point, Ms. Cohen.
8 I'll give you an opportunity to speak.

9 As I was saying, if anything, it shows that he was
10 being honest with the doctor and not dishonest or trying to
11 hide something or minimize his conduct. I think it shows he
12 just has no clue. He's clueless about his conduct, which makes
13 him a dangerous person, which warrants a 12-year jail sentence,
14 which warrants extremely close supervision when he's released
15 from prison, which he eventually will be.

16 But what happened in April of 2014 when he was
17 interviewed is that he gave a full confession. What also
18 happened is that he admitted having sex with this 15-year-old.
19 The parties don't talk about this in the papers, but I'm
20 assuming that at the time, law enforcement knew nothing about
21 that other incident. And then, when he spoke to Dr. Berrill,
22 he seemed to be completely open and honest about the incident,
23 but completely or largely unaware of the significance of what
24 he had done. But that's not the same as saying that he was
25 trying to minimize the significance of what he had done. He

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1 admitted guilt. He knew that he was facing a ten-year
2 mandatory minimum sentence. He volunteered this information
3 about the other incident with the 15-year-old.

4 So whatever problems Mr. Terwilliger has, being honest
5 about what's inside his head is not one of those. It's just
6 that what's inside his head is screwed up, and that he needs a
7 tremendous amount of help and support and guidance and probably
8 psychiatric medication to turn his life around to the point
9 that he becomes less likely to engage in this conduct in the
10 future.

11 So as far as I'm concerned, the defendant did accept
12 responsibility for his crime, and I reject the way the
13 government has articulated -- or described, I should say, what
14 he said to Dr. Berrill according to Dr. Berrill's report.

15 Yes, Ms. Cohen. You wanted to be heard?

16 MS. COHEN: Your Honor, I just wanted to clarify that
17 the government's --

18 THE COURT: Honestly, I don't think there's anything
19 that needs to be clarified, but go ahead. You're welcome to do
20 it.

21 Go ahead.

22 MS. COHEN: I just wanted to make plain that the
23 government's view with respect to the acceptance or the
24 inability to accept responsibility was essentially due to the
25 fact that he told Dr. Berrill that he didn't believe -- he

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1 didn't think that the girl that he was talking to was 13.

2 And to the Court's point --

3 THE COURT: Where does it say that in Dr. Berrill's
4 report?

5 MS. COHEN: It says it on Page --

6 THE COURT: He said he waffled about that, and then he
7 acknowledged that he thought that she was 13.

8 And by the way, he had already admitted under oath in
9 this courtroom that he believed that she was 13. So for
10 purposes of the guilty plea, and, therefore, for the sentence,
11 there's no question that he admitted the elements of the
12 offense.

13 But go ahead.

14 MS. COHEN: It's on Page 7.

15 The government's point is simply that this is a
16 defendant who, despite pleading guilty, then essentially denied
17 the essence of the conduct, which is --

18 THE COURT: I don't believe that he did deny the
19 essence of the conduct.

20 What do you say about that, Mr. Ser, in terms of
21 Dr. Berrill's report?

22 MR. SER: When it came to the 13-year-old belief, I
23 think if he waffled -- and I think his letter made clear that
24 we submitted -- he thought she might have been older, but he
25 admitted -- you know, he knew she was a minor. That's what he

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1 admitted in the plea colloquy.

2 I wasn't present at the interview with Dr. Berrill.
3 That's one of the --

4 THE COURT: Well, he didn't know she was a minor,
5 because she wasn't a minor. But he believed she was a minor.

6 MR. SER: Correct. Right. And if there was an
7 issue --

8 THE COURT: It turns out she was not a minor.

9 MR. SER: Right. But as far as the actual age goes,
10 if he made some statements to Dr. Berrill about whether he
11 didn't think she was 13 or not, he still thought she was a
12 minor, based on the picture. Could have been a teen-ager,
13 perhaps older than 13. That's what Mr. Terwilliger identified
14 to me. And I think that's what was in his letter to the Court,
15 as well. It's probably my best recollection of that report. I
16 know there was waffling. Your Honor is right. It was kind of
17 inconsistent in places, but . . .

18 THE COURT: But you know, I think it reflects the fact
19 that the defendant is a troubled individual with a real lack of
20 insight into his own conduct, into his own behavior. And
21 because of that, he's now facing 12 years in prison, which is a
22 really long time to be in prison. And notwithstanding the fact
23 that he didn't actually engage in a sexual relationship with
24 the person who he believed to be a 13-year-old girl. So the
25 consequences of his behavior are extremely severe, and it's

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1 regrettable that he does not fully appreciate that yet. But if
2 anything, that just demonstrates what a screwed up individual
3 he is -- and that's a nontechnical term, but an individual with
4 such emotional and mental health issues that he needs an
5 enormous amount of counseling and treatment in the future.

6 Anything further on this, Ms. Cohen?

7 MS. COHEN: No, your Honor.

8 THE COURT: You see my point, though, Ms. Cohen. If
9 you use a report like this as a sword, if you turn this into
10 "Aha. And in addition, he said to the doctor the following
11 things," then what you're going to do -- and you know, you do a
12 lot of these cases. What you're going to is to discourage
13 people like Mr. Ser and Mr. Ser's future clients from agreeing
14 to participate in one of these evaluations, because they're
15 going to say, "Look. If anything comes up in that evaluation
16 that can be used against you, the government will jump all over
17 it." And so that's going to discourage them from doing it.

18 And I'm telling you both right now, since both of you
19 have been in front of me on other cases and will be in front of
20 me on other cases, if you do not choose to undergo or have your
21 client undergo one of these evaluations because you feel that
22 there's a risk of that happening, that problem we're describing
23 right now, I'm not holding that against the defendant. I'm
24 just not going to do it.

25 As far as I'm concerned, the defendant has no

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1 obligation to undergo this psychosexual evaluation. In many
2 cases, it's actually helpful to the defendant, both in terms of
3 his own mental health and also in terms of the sentence that
4 ultimately gets imposed, but not always. And when the
5 government jumps all over what it perceives to be lack of
6 acceptance of responsibility, then it has the direct, I think,
7 counterproductive consequence of discouraging people from
8 participating, not only agreeing to do this, engage in --
9 excuse me -- not only agreeing to be evaluated, but also being
10 totally honest when evaluated. That's the effect that it would
11 have.

12 So I'm not going to tell you how to do your job, but
13 that to me is -- that's a matter of concern to me, because this
14 is a report that I ordered. You didn't order it. I ordered
15 it. And I ordered it because the Probation Officer recommended
16 it, and the defendant and the defense lawyer consented to
17 undergo the evaluation.

18 I did not order it -- it's almost as if you're using
19 my order that this evaluation occur against the defendant, and
20 I am emphatically not a member of the Executive Branch or the
21 U.S. Attorney's Office, and I do not have my orders designed
22 solely for the purpose of determining risk assessment and
23 treatment, future treatment, thrown back at me as if I was the
24 one who conducted some further investigation into the
25 defendant's background and underlying circumstances of the

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1 case. That's not what this is about. And I don't want to
2 be --

3 The effect of what you're doing is that when I read
4 your letter, I think to myself, "Well, the prosecutor thinks
5 that I'm like an Assistant Prosecutor to the Assistant
6 Prosecutor." And I'm not that. Okay? I know that it wasn't
7 your intent. I know that you were well-intentioned in this
8 regard. But you need to appreciate the consequences of what
9 you do. And in my view, the consequences of what you did here
10 are bad. And maybe the next time, Mr. Ser's client is not
11 going to undergo the evaluation, which is going to be to the
12 detriment of the government's interest and the detriment of the
13 public's interest.

14 MS. COHEN: Your Honor, I would only say that my
15 understanding is that the evaluations are prepared because they
16 help the Court, in terms of figuring out who is this person,
17 what kind of risks do they present. And in the same way the
18 Probation Office uses that report, the fact that you have a
19 defendant who pleads guilty, and then goes to the psychiatrist
20 or the evaluator, and says, "I didn't believe that it was a
21 13-year-old. I never had sex with anybody who was underage."
22 And he tells you in his letter that, in fact, the reason he
23 withheld that information was because he didn't want to get in
24 trouble. I mean, so it's not that he didn't understand or
25 didn't -- you know, he makes it clear that he knew he wasn't

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1 being truthful with the evaluator.

2 I guess my point is simply that I think that the
3 evaluation, the government took issue with the fact that he
4 wasn't honest, in the sense that he denied that he believed
5 that he was talking to a minor.

6 THE COURT: Let me ask you this question. Why did the
7 government not bother to arrest Mr. Terwilliger or follow up
8 on -- I mean, I wasn't going to bring this up, because it
9 seemed a little bit irrelevant, but I'm bringing it up now,
10 because we are talking about, you know, the government's view
11 of something like this. Why didn't the government pursue this
12 matter for six or eight months after this conversation ended?
13 Why was it not until April of 2014 that the government decided
14 to do a search warrant or interview the defendant?

15 MS. COHEN: I don't have a good answer for you on
16 that. There was a lag time with respect to when the lead came
17 in and when it was acted upon. There's no question. There's a
18 lot of -- you know, unfortunately, there's a lot of very worthy
19 investigations out there, and sometimes they don't move as
20 quickly as they should.

21 THE COURT: Mr. Ser did not make the argument, which
22 he might have made, I'm not sure if it would have made anything
23 of it, but he might have made the argument that the
24 government's failure to follow up on this undercuts their
25 suggestion that the conduct that the defendant engaged in

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1 warrants a 20- to 25-year sentence. If it was that serious
2 conduct, you would think that the government would have pursued
3 it more vigorously.

4 Well, for example, let's just say, hypothetically,
5 that a victim called the police and said, "I was just violently
6 and forcibly raped by So-And-So;" in other words, the kind of
7 conduct, if true, that would warrant such a lengthy sentence,
8 particularly if that person had some prior criminal history or
9 prior sex offender history. I'm pretty sure that the police
10 would have followed up on that pretty quickly. They wouldn't
11 have said, "Well, we'll get to it in about six months. We're
12 kind of busy right now. We'll get to it. It's just that, you
13 know, you're going to have to wait six or eight months."

14 The point being that one could make the argument -- it
15 wasn't made here, it does not play any role in the sentence
16 that I'm imposing, that if the government really -- "the
17 government," meaning the United States Attorney's Office and
18 the FBI -- if the government really believed that this case
19 warranted a 20 -- even more than that, 293 months, that's
20 nearly 25 years, that this conduct warranted a 25-year
21 sentence, then they would have pursued the matter more
22 vigorously, and they wouldn't have waited six months, during
23 which time, apparently, Mr. Terwilliger had this relationship
24 with a 15-year-old. Perhaps if the government had followed up
25 immediately, that never would have happened. I don't know.

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1 Who knows? One can't really say one way or the other. But it
2 tends to undercut this notion that what he did here is worthy
3 of spending the next two or three decades in prison.

4 I think we've discussed that enough. As I said, the
5 fact that it was not followed up on and the fact that it may
6 have given rise to this other incident that occurred with the
7 15-year-old -- in other words, the failure to confront him
8 about what the government already knew he had said, they had
9 the information. It was all, I'm sure, recorded and
10 downloaded. I'm not saying that that justifies a lesser
11 sentence. I'm not. But it does give me pause in considering
12 whether the government really honestly in its heart believes
13 that what Mr. Terwilliger did warrants 20 to 25 years in
14 prison.

15 Anyway, the bottom line is that, given the nature and
16 circumstances of the offense, the history and characteristics
17 of the defendant, the sentence I intend to impose is
18 sufficient, but not greater than necessary, to reflect the
19 seriousness of the offense, promote respect for the law, and
20 provide just punishment for the offense. Also, it will afford
21 adequate deterrence to criminal conduct and protect the public
22 from further crimes of the defendant.

23 Does either counsel know of any legal reason why the
24 sentence should not be imposed as stated?

25 MS. COHEN: No, your Honor.

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1 MR. SER: No, your Honor.

2 THE COURT: Mr. Terwilliger, could you please stand?

3 It is the judgment of this Court that you be committed
4 to the custody of the United States Bureau of Prisons for a
5 total term of 144 months, to be followed by 5 years of
6 supervised release.

7 The standard conditions of supervised release 1 to 13
8 shall apply.

9 The following mandatory conditions shall also apply;
10 they're on Pages 24 to 25 of the presentence report:

11 The defendant shall not commit another federal, state
12 or local crime.

13 The defendant shall not illegally possess a controlled
14 substance.

15 The defendant shall not possess a firearm or
16 destructive device.

17 The mandatory drug testing condition is suspended, due
18 to imposition of a special condition requiring drug treatment
19 and testing.

20 And the defendant shall cooperate in the collection of
21 DNA, as directed by the Probation Officer.

22 The following special conditions shall also apply.

23 Now, actually, Mr. Ser, I want to --

24 You can have a seat, Mr. Terwilliger, for a moment,
25 because I should have brought this up earlier.

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1 The proposed Special Condition Number 1 is essentially
2 home detention. I'm not imposing home detention. I'm imposing
3 12 years of prison. So I'm a little bit confused by this.

4 I mean, are you objecting to this, or not objecting to
5 this?

6 MR. SER: I will object to it at this time, your
7 Honor.

8 Generally, in the past, if I've objected to
9 conditions, I've been told by judges that it's their discretion
10 to decide what to put in.

11 I will object at this time, based upon the length of
12 the sentencing. I think that transforms it into a lengthier
13 sentence than is needed. I think the close supervision will be
14 more than sufficient, along with other counseling and treatment
15 your Honor has indicated you intend to order.

16 THE COURT: Ms. Cohen, why is this Condition Number 1,
17 home confinement, something in addition to the 12 years'
18 imprisonment, an additional sort of not jail sentence, but home
19 confinement on top of that? And that's what it seems to be.
20 It says, "You shall remain in your place of employment" --
21 excuse me -- "your place of residence, except for employment."
22 I'm just confused by that.

23 MS. COHEN: I think it also talks about other
24 activities, as approved by the Probation Officer. So
25 essentially, it allows for the Probation Office to be quite

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1 involved in overseeing what activities --

2 THE COURT: I have no doubt that the Probation Office
3 is going to be quite involved in overseeing the defendant's
4 activities.

5 I'm not going to impose Special Condition Number 1. I
6 won't impose Special Condition Number 1.

7 So the special conditions that I am going to impose
8 are as follows:

9 1. The defendant shall undergo sex-offense-specific
10 evaluation, and participate in a sex offender treatment and/or
11 mental health treatment program approved by the Probation
12 Officer. The defendant shall abide by all rules, requirements
13 and conditions of the sex-offender-treatment programs,
14 including submission to polygraph testing. The defendant shall
15 waive his right of confidentiality in any records for mental
16 health assessment and treatment imposed as a consequence of
17 this judgment, to allow the Probation Officer to review the
18 defendant's course of treatment and progress with the treatment
19 provider. The defendant will be required to contribute to the
20 cost of services rendered in an amount approved by the
21 Probation Officer, based on ability to pay or availability of
22 third-party payment.

23 2. The defendant shall not have deliberate contact
24 with any child under 17 years of age, unless approved by the
25 Probation Officer. The defendant shall not loiter within a

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1 hundred feet of schoolyards, playgrounds, arcades or other
2 places primarily used by children under the age of 17.

3 3. The defendant shall not have contact with the
4 victims in this case. This includes any visible, visual,
5 written or telephonic contact with such persons. Additionally,
6 the defendant shall not directly cause or encourage anyone else
7 to have such contact with the victims.

8 And I'm going to leave it the way it is, but it's not
9 precisely clear who the victim is in this case. The offense of
10 conviction involved an undercover agent. But in any event,
11 I'll leave it in the way it is.

12 I'm not going to impose the search condition, which is
13 proposed Condition Number 5. This is not a contraband case or
14 a case in which there is some concern about the defendant, you
15 know, engaging in or having contraband in his home.

16 I am going to impose the next proposed condition,
17 which I guess will be Number 4 on my list. The defendant is
18 not to use a computer, Internet-capable device or similar
19 electronic device to access child pornography or communicate
20 with any individual or group, for the purpose of promoting
21 sexual relations with children.

22 Defendant shall consent to the use and/or installation
23 of a computer program, which shall monitor suspect computer use
24 of any computer owned or controlled by the defendant. The
25 programs used will be designed to identify to the Probation

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1 Office only the viewing, downloading, uploading, transmitting
2 or otherwise using any images or content of a sexual nature,
3 defined as "suspect computer use." Suspect computer use shall
4 be identified by the installed programs and/or the Probation
5 Officer through the screening of the defendant's computer usage
6 for certain key words, phrases and images.

7 5. The defendant will participate in a program
8 approved by the U.S. Probation Office, which program may
9 include testing to determine whether the defendant has reverted
10 to using drugs or alcohol. The Court authorizes the release of
11 available drug treatment and evaluations and reports to the
12 substance abuse treatment provider, as approved by the
13 Probation Officer. The defendant will be required to
14 contribute to the cost of services rendered, co-payment, in
15 other words a co-payment in an attempt -- excuse me -- in an
16 amount determined by the Probation Officer, based on ability to
17 pay or availability of third-party payments.

18 And finally, it is recommended that the defendant be
19 supervised by his district of residence.

20 And I state for the record that the conditions that I
21 am imposing, both the standard conditions, the mandatory
22 conditions and the special conditions, do have the effect of
23 requiring very close -- not only requiring, but authorizing
24 very close monitoring of the defendant both through his
25 involvement in the treatment program, the fact that he needs to

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1 have a computer program installed on the computer that he might
2 use that could detect the use by him of anything online of a
3 sexual nature, and also that he's going to be required to
4 participate in drug treatment.

5 All right. I find that the defendant does not have
6 the ability to pay a fine.

7 Oh, in addition -- I'm sorry -- the defendant is
8 directed to report -- this is a special condition -- directed
9 to report to the nearest Probation Office within 72 hours of
10 his release from custody. That will be a special condition of
11 probation, as well.

12 I find the defendant does not have the ability to pay
13 a fine, and, therefore, I am not imposing a fine.

14 Restitution is not applicable here.

15 I am imposing the mandatory special assessment of
16 \$100, which is due immediately.

17 The foregoing constitutes the sentence of the Court.

18 Mr. Terwilliger, you have the right to appeal your
19 sentence, subject to any limitations on that right contained in
20 your plea agreement with the government. If you're unable to
21 pay the costs of an appeal, you may apply for leave to appeal
22 without payment of costs. A notice of appeal must be filed
23 within 14 days after the entry of judgment. Therefore, if you
24 do wish to appeal, you must advise your attorney to prepare and
25 file a notice of appeal immediately. Or if you request, the

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1 Clerk will immediately prepare and file a notice of appeal on
2 your behalf.

3 I don't believe there are any open counts. Is that
4 correct?

5 MS. COHEN: To the extent there are, the government
6 moves to dismiss.

7 THE COURT: Well, that wasn't really my question.

8 MS. COHEN: I know that at one point, there were
9 charges in the complaint. There was a production charge and
10 exploitation, attempted exploitation.

11 THE COURT: Well, the only thing I care about is the
12 information, because that's the only thing that brings this
13 matter in front of me. And there are no open counts. I just
14 looked at it. It's a one-count information.

15 Any recommendations to the --

16 So your application is denied, because there's nothing
17 to dismiss.

18 Any recommendations that you'd like me to include in
19 the judgment?

20 MR. SER: Your Honor, that he be housed as near as
21 possible to his family and home in Sullivan County. And then,
22 although I don't think -- know, in fact, he won't be able to
23 take advantage of the early release, would your Honor recommend
24 the RDAP program so that he can begin dealing with the drug
25 issues in custody?

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1 THE COURT: I know he certainly has had drug problems
2 in the past. That's not his principal --

3 MR. SER: He was a long-term abuser of prescriptive
4 medications; in particular, painkillers, and marijuana. I'm
5 more concerned about the painkillers. But if he can get a
6 program -- and he's not going to be eligible for early release,
7 given the nature of the conviction, but he should potentially
8 be able to attend and take part in the program itself.

9 THE COURT: All right. The PSR does say that the
10 defendant said that he admitted that he had used marijuana from
11 the age of 16 or 17 daily up until his arrest, and that since
12 he was about 20 or 21, he began using Vicodin or Percocet every
13 day until his arrest for the instant offense.

14 So I will recommend that the defendant participate in
15 the Residential Drug Abuse Treatment Program. Doesn't
16 guarantee that he's going to get the program, but I'll
17 recommend it.

18 MR. SER: Thank you, your Honor.

19 THE COURT: And I'll also recommend that he be
20 designated to a facility as close as possible to his home in
21 Sullivan County, New York.

22 All right. Anything else?

23 Ms. Cohen?

24 MS. COHEN: No, your Honor.

25 Thank you.

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1 THE COURT: My deputy just handed me a note about
2 registration as a sex offender. There is nothing in the
3 presentence report about that as a condition of supervised
4 release. There usually is. I'm not sure why that is.

5 The person who did this report is not familiar to me.
6 Obviously, I disagree with a lot of what's in the report, or at
7 least a lot of what's in the recommendation.

8 MS. COHEN: I actually did not catch that, either.
9 But yes, he is required to register as a sex offender.

10 THE COURT: Well, I don't have the exact language
11 of --

12 Hold on just one second.

13 THE DEPUTY CLERK: It's one of the mandatory
14 conditions?

15 THE COURT: It's one of the mandatory conditions,
16 right.

17 Hold on one second.

18 (Pause)

19 THE COURT: This will be included among the mandatory
20 conditions.

21 MR. SER: It is in the plea agreement, your Honor. I
22 would point that out.

23 (Pause)

24 THE COURT: Okay. So one additional mandatory
25 condition of supervised release is that the defendant shall

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1 comply with the requirements of the Sex Offender Registration
2 and Notification Act, as directed by the Probation Officer,
3 Bureau of Prisons or any state sex offender registration agency
4 in which he or she resides or is working or is a student or was
5 convicted of a qualifying offense.

6 So that is now on the record as a mandatory condition.

7 All right. Thank you.

8 Anything else, Ms. Cohen?

9 MS. COHEN: No, your Honor.

10 THE COURT: Mr. Ser?

11 MR. SER: No, your Honor.

12 Thank you.

13 THE COURT: All right. Mr. Terwilliger, I wish you
14 the best of luck.

15 THE DEPUTY CLERK: All rise. This Court will be in
16 recess.

17 - - -